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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

DONNA WINTERS, an individual person,

Petitioners,

v.

COSTCO WHOLESALE GROUP BENEFITS PROGRAM and CONCEPT ADMINISTRATORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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July 17, 1995

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA COLE WINTERS,	)	
	)	
Plaintiff-	)	
Appellee,	)	No. 93-35851
	)	
v.	)	D.C. No.
	)	CV-92-00581-
COSTCO WHOLESALE	)	WLD
CORPORATION,	)	
a Washington	)	OPINION
corporation;	)	
CONCEPT ADMINISTRATORS,	)	
INC., a California	)	
corporation,	)	
	)	
Defendants-	)	
Appellants.	)	

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted
October 5, 1994--Seattle, Washington

Filed March 6, 1995

Before: Donald P. Lay,* Stephen S. Trott

and Thomas G. Nelson, Circuit Judges

Opinion by Judge T.G. Nelson

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*Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Labor and Employment/Health Care Coverage/ERISA

The court of appeals reversed a district court judgment and remanded the court held that an administrator of an Employee Retirement and Income Security Act (ERISA) health benefit plan did not abuse its discretion in denying a claim for benefit relating to a gamete intrafallopian transfer (GIFT) procedure as an excluded charge in connection with "in-vitro" fertilization.

As an employee of appellant Costco Wholesale Corp., appellee Donna Winters participated in the company's self-insured ERISA health benefit plan. the plan excluded charges "not reasonably

necessary for the diagnosis and treatment of Illness or Injury." the plan also excluded from coverage charges "in connection with in vitro fertilization" (IVF) plan provides that the plan's administrator has absolute discretion and authority to construe disputed or seemingly inconsistent plan provisions and to make all decisions regarding eligibility and/or entitlement to coverage or benefits.

Winters filed a claim ft reimbursement of expenses related m a gift procedure. the gift procedure involves retrieving eggs from the patient's ovaries and placing the eggs, along with sperm, in the patient's fallopian tube. Winters' claim was denied by appellant Con-

cept Administrators. Inc., Costco's third-party claims administrator, as a charge in connection with in-vitro fertilization. the denial was affirmed by Costco with advice from a consulting firm to health benefits providers.

Winters sued the plan and the plan administrator (collectively, Costco), challenging the denial of benefits. The district court granted Winters summary judgment under ERISA. determining that she was entitled to reimbursement for the

expenses of the GIFT procedure. the court concluded that the administrator's decision conflicted with the 'plain and ordinary meaning' of IVF and therefore, constituted an abuse of discretion. Alternatively, the court stated that if the plain an ordinary meanings of IVF and GIFT were not used, the plan's term "IVF" would have to be deemed ambiguous; the court observed that the rule of *contra proferentem* would result t the ambiguity being resolved in Winters' favor. Costco appealed.

[1] Where an ERISA plan vest the administrator with discretionary authority to determine benefit eligibility, the district court can review the administrator's determination only for abuse

of discretion. [2] In this case. however, because the administrator was the employer, a more stringent version I the abuse of discretion standard applied to Costco's decision to deny Winters health benefits.

[3] In evaluating Winters' claim, the administrator relied on a statement of a consulting physician that gift involves combining eggs with sperm "in vitro." 1he administrator alt reviewed Winters' medical records which characterized her procedure as "in vitro," [4] Thus, it could not be said that the interpretation given to "in vitro" by Costco clearly conflicted with the plain language of the plan. Based on the evidence in the administrative record

Costco's interpretation was not unreasonable. The district court erred in second-guessing the exercise of discretion, because there was no abuse of that discretion.

[5] There was no reason why the heightened abuse of discretion review would change the result in this case. Even if Costco had an interest in broadly construing the in vitro exclusion. there were no indications that the conflict had a impact on the decision to deny benefits.

[6] The rule of *contra proferentem* is not applicable to self-funded ERISA plans that bestow explicit discretionary

authority upon an administrator to determine eligibility for benefit or to construe the terms of the plan.

[7] Winters had no objectively reasonable expectation of coverage for the GIFT procedure.

[8] The district court was instructed on remand to enter judgment in favor of Costco.

COUNSEL

Warren J. Rheaume and James B. Bristol, Foster, Pepper & Shefelman, Seattle. Washington, for the defendant-appellants Lish Whitson and Richard E. Spoonemore, Helsell. Fetterman, Martin. Todd t Hokanson, Seattle. Washington, for the plaintiff-appellee.

OPINION

T.G. NELSON, Circuit Judge:

Costco Wholesale Group Benefits Program (the "Plan") and Concept Administrators, Inc. (the "Plan Administrator"), appeal the district court's summary judgment in favor of Donna Cole Winters in her action seeking reimbursement from the Plan for medical expenses related to a gamete intrafallopian transfer ("GIFT") procedure. the Plan is an employee welfare benefit plan subject to regulation under the Employee Retirement Income Security Act cf 1974 ("'ERISA"), 29 U.S.C. s 1001. et seq. We reverse and remand.

I.

FACTS AND PRIOR PROCEEDINGS

As a Costco employee, Winters was a participant in the company's self-insured ERISA health benefits plan. Winter: filed a timely claim for reimbursement of expenses related to a GIFT procedure performed on December 17, 1990. The procedure involves retrieving eggs from the patient's ovaries and placing the eggs, along with sperm, in the patient's fallopian tube.

Section 6.8 of the health plan excludes "[c]harges not reasonably necessary for the diagnosis and treatment of Illness or Injury." Section 6.31 of the plan excludes from coverage "[[C]harges in connection with in-vitro fertiliza-

tion." There i no mention of Gift procedures. Section 14.9 provides that [t]he Plan Administrator ha[s] the absolute discretion an authority to construe disputed or seemingly inconsistent provisions of the Plan and to make all decisions regarding eligibility and/or entitlement to coverage or benefit."

Winters' claim was denied by Concept Administrators Inc.. Costco's third-party claims administrator, as a charge connection with in-vitro fertilization. The denial was affirmed by Costco[1] with advice from Ethix North-

[1] The Costco Wholesale Group Benefits Committee is the Plan Administrator within the meaning of section 3(16)(A) of ERISA, 29 U.S.C. § 1002(16)(A). Concept Administrators acts as an agent of the Plan Administrator under an agreement with Costco and is responsible for processing claims for Plan benefits. Concept's decisions are subject to review by the Plan Administrator.

west, a consulting firm to health benefits providers.

Winters subsequently filed a case against the Plan and the Plan Administrator, challenging the dental of benefits in state court. The defendants removed the case to the district court. Both sides moved for summary judgment The district court granted Winters summary judgment under ERISA determining that she is entitled to reimbursement for the expenses of the gift procedure performed on December 17, 1990.

The court concluded that "[under the "plain and ordinary meaning' of IVF as provided by the dictionary and medical text sources. the administrator's decision cannot stand because it con-

flicts with that meaning and therefore constitutes an abuse of discretion. GIFT, unlike IVF, involves in vivo - specifically, intrafallopian - fertilization of the egg." (Emphasis added-) the court found it unnecessary to address Winters' argument that the standard of review should be less deferential in view of the Plan Administrator's conflict of interest because Winters "prevail[s] even under the more deferential abuse of discretion standard"

Alternatively, the court explained that "[i]f the 'plain and ordinary meaning' of IVF and GIFT set out above were not used, then "IVF' - the term used in the plan - would have to be deemed ambiguous." Nothing that defendants' own

expert testified in his deposition that the policy "may be ambiguous" with respect to the gift procedure and that this could create confusion, the court observed that the rule of *contra proferentem* would result in the ambiguity being resolved in winters' favor. The Plan and the Plan Administrator (collectively referred to as "Costco") timely appeal.

II.

STANDARD OF REVIEW

[1] Where an ERISA plan vests the administrator with discretionary authority to determine benefit eligibility. "a district court may review the administrator's determinations only for an abuse of discretion." *Taft v. Equitable Life Assurance*

Soc'y, 9 F.3d 1469, 1471 (9th Cir. 1993) (citing *Firestone Tire & Rubber Co. v.* Bruch, 489 U.S. 101, 115 (1989)). This court reviews the district court's application of this standard and the conclusion that Costco abused its discretion de novo. *Id.*

[2] In this case the Plan Administrator is the employer. Therefore, this court "impose[s] a more *stringent* version of the abuse of discretion standard" to Costco's decision to deny Winters health benefits. *Id.* at 1474 (internal quotation omitted). This court reviews *de novo* whether the plan's terms are ambiguous. *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948,

950 (9th Cir. 1993); *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 537 (9th Cir.,) *cert.* denied, 498 U.S. 1013 (1990).

III.

DISCUSSION

Costco makes two basic arguments on appeal. First, Costco argues that the district court applied the wrong standard to review the interpretation of the Plan by the Plan Administrator. and should have given deference to the Plan Administrator's interpretation. rather than apply the doctrine of *contra proferentem*. Second, Costco argues that the district court's interpretation of the Plan under *contra proferentem* was not only improper, but

incomplete, because it did not address or consider Plan provisions concerning "covered charges."

Costco contends that while the district court purported to apply an abuse of discretion standard to the Plan Administrator's denial decision, it actually did not accord the decision any deference, and instead substituted its own definition of "in vitro fertilization." Section 14.9 of the Plan expressly grants absolute discretionary authority to the Plan Administrator to "interpret or construe all provisions of the Plan" and "construe disputed or seemingly inconsistent provisions of the Plan and to make all decisions regarding eligi-

bility and/or entitlement to coverage or benefits." This is sufficient to trigger the deferential abuse of discretion standard of review. *See*

Firestone, 489 U.S. at 115; *Eley v. Boeing Co.*, 945 F.2d 276, 278 (9th Cir. 1991). Because the employer is the administrator, a conflict of interest exists. and we therefore "impose a more *stringent* version of the abuse of discretion standard" to Costco's decision. *Taft*, 9 F.3d at 1 474 (internal quotation omitted); *see also Eley*, 945 F.2d at 279.

"[T]he abuse of discretion standard permits the district court to review only the evidence presented to the plan trustees. *Taft*, 9 F.3d at 14-71 (internal quotation and brackets omitted); *see also McKenzie v. General Tel. Co.*, 41 F.3d 1310.1316(9th Cir.1994). Because Costco gave an explanation for

the denial of benefits, the question is whether it abused its discretion in construing provisions of the plan in a way that conflicts with the plain language of the plan. *See Eley*, 945 F.2d at 279.

[3] In evaluating Winters' claim the Plan Administrator relied on a statement of a consulting physician that GIFT consists of surgical removal of eggs from the ovaries of the patient combining the eggs with sperm outside of the patient's body, or "in vitro," and then placement of the same into the patient's fallopian tube. The Plan Administrator also reviewed Winters' medical records from the University of Washington Medical Center which characterized her procedure as "in vitro."

[4] Winters has vigorously maintained and the district court agreed that GIFT and in vitro fertilization are distinguishable. However, this does not necessarily demonstrate that the interpretation given to "in vitro fertilization" by Costco clearly conflicts with the plain language of the Plan See *id.* (not an abuse of discretion to interpret a screening test as a "diagnostic test" and deny benefits on that basis). *In Eley*, the affidavits submitted on behalf of the employer stating that a Pap test is referred to as a diagnostic test by at least some of the medical academic community were not refuted. *Id.* Here, not only did the Plan Administrator's medical consultant

characterize GIFT as involving "in vitro" aspect. Winters' own medical records for the procedure contained "IVF' notations. Thus as in *Eley*, we cannot say that the interpretation given to "in vitro" by Costco clearly conflicts with the plain language of the Plan. *See also Taft*, 9 F.3d at 1473 ("In the ERISA context even decisions directly contrary to evidence in the record do not necessarily amount to an abuse of discretion.") "Our inquiry is not into whose interpretation of the plan documents is most persuasive, but whether the plan administrator's interpretation is unreasonable." *Barnett v. Kaiser Found. Health Plan, Inc.*, 32 F.3d 413, 416 (9th Cir. 1994) (quotation and brackets omitted).

Based on the evidence in the administrative record, Costco's interpretation was not unreasonable. The Plan made clear that the Plan Administrator had the final determination of benefit decisions. the district court erred in second-guessing the exercise of discretion, because there was no abuse of that discretion.

[5] As in *Eley,* the district court did not evaluate Costco's dual role as employer and Plan Administrator. *Taft,* 945 F.2d at 279. "The precise nature of the less deferential review in this context is not clear." *Taft,* 9 F.3d at 1474. However, even if Costco has an interest in broadly construing the in vitro exclusion, there are no indications

that the conflict had an impact on the decision to deny benefits. *See id.* (no evidence that company acted in bad faith or wit improper motives at any time during employee's twenty-five years of employment). We can discern no reason why the heightened abuse of discretion review would change the result in this case. *See id.*; *Taft,* 945 F.2d at 279.

In an alternate ruling. the district court held that the term "in vitro fertilization" was ambiguous, and that the ambiguity should have been resolved in Winters' favor under the rule of *contra proferentem*. *See Kunin,* 910 F.2d at 538-39. In *Kunin,* the court held in the alternative that *contra proferentem* applied in that case, which involved an

ERISA-governed insurance policy by the employer. *Id.* at 539-41.

However, as in *Eley*, *Kunin* does not alter the result in this case. *See Eley*, 945 F.2d at 279-80. *Eley* distinguished *Kunin* on the grounds that the plan in *Eley*, unlike the plan in *Kunin*. (1) was the result of collective bargaining, and (2) was self-funded. Id. at 280. While the Plan at issue here was not the result of collective bargaining, it is self-funded.

[6] Furthermore. it is not proper to rely on this principle of construction where, as here, the Plan grants the fiduciary explicit discretion to interpret the Plan. In *Kunin*, we explained that *contra proferentem* "is based upon the principle of contract construction that when one party is responsible for

the drafting of an instrument, *absent evidence indicating the intention of the parties*, any ambiguity will be resolved against the drafter." *Kunin*, 910 F.2d at 539 (quotation omitted; emphasis added). In contrast the Plan here states that the Plan Administrator has "the absolute discretion and authority to construe disputed or seemingly inconsistent provisions of the Plan and to make all decisions regarding eligibility and/or entitlement to coverage or benefits." The Plan thus states how Plan terms are to be interpreted, and the general rule of *contra proferentem* does not apply. *See O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc.*, 37 F.3d 55. 61 (2d Cir. 1994) ("We are less

inclined to rely on *contra proferentem*] where, as here, the plan grants the fiduciary discretion to interpret the plan."). We hold that the rule of *contra proferentem* is not applicable to self-funded ERISA plans that bestow explicit discretionary authority upon an administrator to determine eligibility for benefits or to construe the terms of the plan.

In view of our holding, we need not address Costco's argument that the district court's application of *contra proferentem* resulted in the anomalous ruling that GIFT must be covered under the Plan, because it is different than in vitro fertilization. even though the Plan does not include any reproductive

procedures in its "Covered Charges" provisions.

Subsequent to the district court's decision,, we held in *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 387 (9th Cir. 1 994), that the doctrine of reasonable expectations applies as a principal of federal common law controlling interpretation of ERISA-governed insurance contracts. In that case, a group health plan denied liability to a claimant based on a pre-existing condition exclusion. *Id.* at 386. Review of the plan at issue revealed that the plan "chose to bury one of the plan's most significant provisions amidst definitions, rather than forthrightly stating the pre-existing conditions exclusion in

the operative clauses of the plan description." *Id.* at 385. We held that because the plan's attempted exclusion was not clear, plain, and conspicuous enough to negate the claimant's objectively reasonable expectations of coverage, it was unenforceable and the plan was liable for the coverage at issue. *Id.* at 387.

Unlike the claimant in *Saltarelli*, Winters had no objectively reasonable expectation of coverage for the GIFT procedure. Costco made its exclusionary clauses conspicuous, plain and clear. The clauses the exclusionary clauses were listed under an appropriate heading in the Plan table of contents. The exclusions were clearly numbered, placed

under underlined headings, and set off in separate paragraphs. Winters was also notified prior to this medical treatment through two separate letters, that in vitro fertilization procedures were excluded from coverage because they are not medically necessary for treatment of an accidental injury or illness. We agree with Costco that there is no evidence in the record upon which a reasonable trier of fact could find an objective, reasonable expectation of coverage on the part of Winters.

IV.

CONCLUSION

[8] We reverse and remand with instructions to enter judgment in favor of Costco.

REVERSED AND REMANDED.

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APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONNA COLE WINTERS,	)	
	)	
	)	
Plaintiff,	)	No. C92-581WD
	)	
v.	)	ORDER ON
	)	MOTIONS FOR
COSTCO WHOLESALE GROUP	)	SUMMARY
BENEFITS PROGRAM, a	)	JUDGMENT
group benefit plan;	)	
and CONCEPT	)	
ADMINISTRATORS, INC., a	)	
California	)	
corporation,		
Defendants.		

I. INTRODUCTION

In an attempt to conceive a child, plaintiff Donna Cole Winters underwent a gamete intrafallopian transfer ("GIFT") procedure in December 1990. Plaintiff's employee health benefits plan denied her

claim for reimbursement of GIFT-related expenses on the ground that the plan excludes " [c]harges in connection with in-vitro fertilization." Plaintiff now sues the benefits plan and its claims administrator under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. ("ERISA"), for medical expenses, prejudgment interest, and attorney fees and costs.

Both sides have moved for summary judgment. Defendants seek summary judgment of dismissal. Plaintiff seeks summary judgment under ERISA determining that she is entitled to reimbursement for the expenses of the GIFT procedure performed on December 17, 1990. All materials filed in support of or opposition to

the motions have been fully considered. No party has requested oral argument and none is necessary.

II. UNDISPUTED FACTS

Plaintiff is a participant in the Costco Wholesale Group Benefits Program ("Costco"), a self-insured employee benefits plan established under ERISA, 29 U.S.C. § 1002(1). Between 1983 and August 1990 plaintiff underwent several fertility-related treatments, including laprascopic surgery, in vitro fertilization ("IVF"), and at least two prior GIFT procedures.

Under the terms of the benefits plans in effect prior to August 1990 defendants paid some of plaintiff's claims but denied others. in August 1990 a new

benefits plan took effect. Section 6.31 of the plan excludes from coverage "[c]harges in connection with in-vitro fertilization." See Defendants' Ex. 2. There is no mention of GIFT procedures.

On December 17, 1990, plaintiff underwent another GIFT procedure. This one was performed at the University of Washington Hospital. The procedure involves retrieving eggs from the patient's ovaries and placing the eggs, along with sperm, in the patient's fallopian tube. Fertilization takes place in the fallopian tube.

Plaintiff submitted a timely claim for reimbursement of the GIFT-related expenses. The claim was denied by Concept Administrators, Inc., Costco's claims ad-

ministrator, as a "charge[i in connection with in-vitro fertilization." The denial was affirmed by Costco with advice from Ethix Northwest, a consulting firm to health benefits providers.

The record reflects that none of the five persons on Costco's "medical review staff" had a medical degree. In a deposition one reviewer admitted being unfamiliar with the terms "gamete intrafallopian fertilization" or "GIFT." See plaintiff's Ex. A. The input from Ethix Northwest consisted of a letter from a doctor that reads: "I have reviewed the documents provided concerning [Donna Cole Winters]. The procedure is specifically for the treatment of infertility and does involve invitro [sic] fertilization of harvested

oocytes . . . ." Defendants' Ex. 1 (Letter from Dr. Frank Schramm to Lynn Gorlick, Concept Administrators, 4/17/91). It is not known what documents the doctor reviewed or in what specialty of practice he engaged.

Plaintiff brought this action challenging the denial of benefits in King County Superior Court in February 1992. The case was removed to this court in April 1992. The main issue presented by the motions for summary judgment is whether the plan administrator violated ERISA in classifying the GIFT procedure as in vitro fertilization in denying coverage.

III. SUMMARY JUDGMENT STANDARD

Summary judgment under Fed. R. Civ. P. 56 may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is One that affects the outcome of the case and requires a trial to resolve differing versions of the truth. Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982). In deciding the motion the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. Poller v. Columbia Broadcasting System. Inc., 368 U.S. 464, 473 (1962); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. red. R. Civ. P. S6(e); T.W. Elec. Serv., Inc., 809 F.2d at 630-31.

IV. STANDARD OF REVIEW

The 1990 health plan states that "[t] Plan Administrator had [sic] the absolute discretion and authority to construe disputed or seemingly inconsistent provisions of the Plan and to make all decisions regarding eligibility and/or entitlement to coverage or benefits." 1990 Plan § 14.9.

The parties agree that where a plan gives the administrator discretionary

authority to determine eligibility for benefits, the administrator's decision is ordinarily reviewed for abuse of discretion. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989). Plaintiff argues that the plan administrator here is a fiduciary with a conflict of interest, and that the decision is therefore "suspect and entitled to little if any deference." See plaintiff's Memorandum in Opposition at 2-7 (citing Brown v. Blue Cross & Blue Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990, cert. denied, 498 U.S. 1040 (1991)). Defendants deny any conflict of interest and take issue with the standard of review proposed by plaintiff.

The Ninth Circuit has not expressly adopted the standard of review urged by plaintiff. It is unnecessary to decide whether to apply that standard, since plaintiff would prevail even under the more deferential abuse of discretion standard.

V. DISCUSSION

An ERISA plan administrator abuses its discretion if it renders a decision that conflicts with the "plain and ordinary" meaning of a plan term. See Elev. v. Boeing Co., 949 F.2d 276, 279 (9th Cir. 1991); Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 536 (9th Cir. 1990). The parties disagree as to the plain and ordinary meaning of the term "in vitro fertilization." The IVF exclu-

sion is the only basis argued by defendants for not affording coverage herein.

Webster's College Dictionary defines "in vitro fertilization" as a "technique by which an ovum is fertilized with sperm in a laboratory dish and subsequently implanted in a uterus for gestation." Random House - Websters College Dictionary (1991)" Accord Stedman's Medical Dictionary (25th Ed. 1990).

GIFT, in contrast, involves fertilization of the eggs within the fallopian tube. Thus IVF and gift are distinct treatments for infertility. For comparative descriptions of the two procedures See Jean M. Eggen, The "Orwellian Nightmare" Reconsidered: A proposed Regulatory Framework for the Advanced Reproductive

Technologies, 25 Ga. L, Rev. 625, 63S (1994 (citing American Fertility Society, In vitro Fertilization-Embryo Transfer in the United States: 1988 Results from the IVF-ET Registry, 53 Fertility & Sterility 13, 14 (1990)i; Susan Goldberg, Of Gametes and Guardians: The Impropriety Of Appointing Guardians Ad Litem for Fetuses and Embryos, 66 Wash. L. Rev. 503, 513 (1991) (citing United States Congress,. Office of Technological Assessment, Infertility: Medical and Social Choices 117-35 (1988)); plaintiff's Ex. D at 17-IS, 42- 43.

Defendants assert, however, that the plain and ordinary meaning of "in vitro fertilization" is something other than the "technical interpretation of the

term[]" provided by the dictionary and medical texts. Defendants' Reply at 7. They contend that IVF "has an acceptable medical meaning that encompasses an array of procedures dealing with the problem of infertility . . . including GIFT." Id. at 7-8.

In support of this assertion defendants point to six of plaintiff's medical charts prepared by hospital personnel in connection with her gift procedure. Those charts contain notations such as "Proposed Operation: IVF"; "in vitro fertilization patient"; "IVF patient"; "IVF Program". See Defendants' Ex. 3.

Defendants also cite Dr. Donald Moore's statement that "you can kind of loosely use" the term IVF to include pro-

cedures such as GIFT. See Defendants' Reply Ex. 2 at 30. Dr. Moore is a staff member of the University of Washington School of Medicine and is certified in obstetrics, gynecology and reproductive endocrinology. But Dr. Moore's statement and the "IVF" notations on the hospital charts are not dispositive. As Dr. Moore explains:

> [R]eally it's ART that refers to all the procedures we do. IVF is just one of the procedures, and it's loosely used [at the University of Washington Hospital] because that's primarily what we do. We do IVF . . .[T]he Program started using IVF in 1984. GIFT came along about two years later . . . [W]e don't do very many GIFT procedures. So we still sort think of our program as we did in the beginning as an IVF program.

Plaintiff's Ex. D at 30-33. The "loose" usage of the two terms at a single hospital fails to show an "acceptable medical meaning" that treats them as interchangeable when, if used correctly, they are not.

Defendants also offer the deposition of Dr. Bruce Amundson of Ethix Northwest, who consulted with Costco about plaintiff's claim. Dr. Amundson, who does not specialize in obstetrics, gynecology, or reproductive endocrinology, differentiates between a looser and stricter usage of the term IVF. He states that:

> [i]n-vitro fertilization . . . has tended to describe a number of procedures used in a general sense. In a more specific . . . physiologic sense, it describes " " " fertilization . . . out of the body, and the reintro-

> duction of the fertilized ovum into the human.

Defendants' Reply Ex. 1 at 12. Dr. Amundson also states: "[M]y interpretation would be that . . . the in-vitro fertilization term has tended to cover . . . artificial technologies such as the GIFT procedure." Id. at 24.

Under the "plain and ordinary meaning" of IVF as provided by the dictionary and medical text sources, the administrator's decision cannot stand because it conflicts with that meaning and therefore constitutes an abuse of discretion. GIFT, unlike IVF, involves in vivo -- specifically, intrafallopian -- fertilization of the egg. If the "plain and ordinary meanings" of IVF and GIFT set out

above were not used, then "IVF" -- the term used in the plan -- would have to be deemed ambiguous. Defendants' expert, Dr. Amundson, has testified:

> Q: Do you think the Costco policy is ambiguous with respect to the GIFT procedure?
> A: In retrospect it may be ambiguous, and I say that because of the continuing lack of clarity . . . (in the way] that term has been used . . . .
>
> * * *
>
> Q: Do you think a patient would be confused, Doctor, if they read [the University of Washington Medical Center's informational pamphlet entitled "Assisted Reproductive Technologies"], then looked at their (Costco] policy which said in vitro fertilization was excluded; would that create confusion?
> A: Yes, I think it could.
> Q: Would a patient, perhaps justifiably, think the GIFT procedure would be covered?
> A: They might.

Plaintiff's Ex. C at 21, 27. See also Dr. Amundson's comment that "my interpretation would be that . . . the in-vitro fertilization term has tended to cover . . . artificial technologies such as the GIFT procedure." Defendants' Reply Ex. 1 at 24 (emphasis added).

The Ninth Circuit has adopted the rule of contra proferentem for the construction of ambiguous terms in ERISA health plans. Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534 (9th Cir. 1990). Under that rule, ambiguous terms in an insurance contract are to be construed in the favor of the insured. In Kunin, an ERISA plan participant incurred over $50,000 in medical bills for the treatment of autism. The insurer and plan ad-

ministrator decided that autism was a "mental illness" and invoked the plan's $10,000 cap on payment of costs for treating "mental illness." The district court looked to "the plain and ordinary meaning that a lay person would ordinarily attach" to the term "mental illness." Kunin v. Benefit Trust Life Ins. Co., 696 F. Supp. 1342, 1345 (C.D. Cal. 19S8). The court concluded that the plan administrator's "inclusion of autism within the limitation clause covering 'mental illness' was not a reasonable interpretation of the . . . plan." Id. at 1347.

The court of appeals affirmed the district court's analysis. In an alternative holding, the court found in favor of the plan participant by applying the rule

of contra proferentem. It examined whether "the term 'mental illness' is so clear and well fixed that an ordinary reader of the policy would recognize that autism must be included." Id. at 541. The court found that the term "had no precise or generally accepted definition." Id. It further observed that the policy "contain[ed] no definition or explanation of the term 'mental illness,' and offer[ed] no illustration of the conditions that are included or excluded." Id. "Under these circumstances/ we conclude that term 'mental illness' is ambiguous. Id.

Applying contra proferentem, the court then construed the ambiguity in fa-

vor of the insured, noted that all fifty states apply that rule, and stated:

> Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence. Moreover, once the policy language has been drafted, it is not usually subject to amendment by the insured, even if he sees an ambiguity; an insurer's practice of forcing the insured to guess and hope regarding the scope of coverage requires that any doubts be resolved in favor of the party who has been placed in such a predicament.

910 F.2d at 540. Cf. Eley v. Boeing Co., 945 F.2d 276, 280 (9th Cir. 1991) (refusing to apply the rule of contra

proferentem to self-insured ERISA plans that "result from arms-length bargaining by parties of equal power, as in the case of collective bargaining agreements").

There is no evidence that the Costco plan was the result of arms-length bargaining by parties of equal power. The plan makes no attempt to define or explain the term "in vitro fertilization" and offers no illustration of the treatments that are included or excluded. "Insurance contracts generally spell out in inordinate detail the meaning of terms that lack a fixed meaning." Kunin, 910 F.2d at 541. Had the plan meant to exclude GIFT it could have expressed that intent clearly. Alternatively, it could have replaced the term "IVF" with

"assisted reproductive technologies" ("ART"), which would have encompassed IVF, GIFT, and related procedures. For uses of the term "ART" See Plaintiff's Ex. C at 11, E, F. See also Eggen, supra at 629 n.6.

It follows that plaintiff's motion for summary judgment must be granted, and defendants' motion for summary judgment under ERISA must be denied.

VI. STATE LAW CLAIMS

The amended complaint asserts two state claims, one for breach of fiduciary duties and one for breach of contract. Plaintiff has withdrawn the former claim. See Defendants' Ex. 1, Plaintiff's Response to Defendants' First Set of Interrogatories and Requests for Production at

No. 9. The common law breach of fiduciary duties claim is therefore dismissed.

The contract claim, though not raised in plaintiff's motion for summary judgment, has not been withdrawn. This clam is preempted by ERISA because it "relates to" an employee benefit plan governed by that statute and is "based upon common law of general application that is not a law regulating insurance." See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 62 (1987); Pilot Life Is. Co. v. Dedeaux, 481 U.S. 41, 48 (1987). Accordingly, the contract claim is dismissed as preempted.

VII. CONCLUSION

For the reasons stated, plaintiff's motion for summary judgment under ERISA

determining that she is entitled to reimbursement of the expenses incurred in her December 17, 1990, GIFT procedure is granted, and defendants' summary judgment motion under ERISA is denied. Defendant's motion for summary judgment dismissing the state claims as abandoned or preempted is granted. Plaintiff's motion for attorney fees, costs, and prejudgment interest will be due on July 8, 1993, and will be briefed and noted on the timetable established by the local rules of this court.

The clerk is directed to send copies of this order to all counsel of record.

Dated: June 24, 1993.

William L. Dwyer
United States District Judge

5YDK4

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA COLE WINTERS,	)	
	)	
Plaintiff-Appellee,	)	No. 93-35851
	)	
v.	)	D.C. No. CV-92-00581-WLD
COSTCO WHOLESALE CORPORATION, a Washington corporation; CONCEPT ADMINISTRATORS, INC., a California corporation,	)	ORDER
Defendants-Appellants.	)	

Before: LAY,* TROTT and T.G. NELSON, Circuit Judges.

Judges Lay, Trott and T.G. Nelson vote to deny the petition for rehearing.

Judges Trott and T.G. Nelson vote to

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* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

reject the suggestion for rehearing en banc, and Judge Lay so recommends.

The full court was advised of the suggestion for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

5YDK3